



PON v LN & 2 others (Family Miscellaneous Civil Case E007 of 2024) [2025] KEHC 2595 (KLR) (14 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY MISCELLANEOUS CIVIL CASE E007 OF 2024**

**DK KEMEL, J
MARCH 14, 2025**

BETWEEN

PON APPELLANT

AND

LN 1ST RESPONDENT

REGISTRATION OF BIRTHS AND DEATHS 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The Applicant filed this Originating Summons dated 16th December, 2024 seeking the following reliefs.
 - i. Spent.
 - ii. That pending hearing and determination of this application, an order do issue prohibiting any party from removing the minors herein, DL and JM from within the borders of the Republic of Kenya.
 - iii. That the birth certificate of DL, entry No 02XXXXX issued on 17th May, 2023 and JM, entry No 06XXXXX issued on 19th January be recalled.
 - iv. That the Applicant’s name herein be included as the father in the said certificates.
 - v. That the 2nd Respondent to reissue the birth certificates of DL, entry No 02XXXXX issued on 17th May, 2023 and JM, entry No 06XXXXX issued on 19th January, 2024 subject to Section 28 (1) and (2) of the Birth and Deaths Registration Act.
 - vi. That the cost of the application be in the cause.



2. The application is supported by grounds set out on the face thereof and the supporting affidavit of PON sworn on even date. The Applicant's gravamen is inter alia; that he is the father of the said minors; that the Applicant applied for birth certificates in 2023 in order to be able to put them through school; that the Applicant discovered the father's name had been omitted; that his attempt to pursue rectification with the 1st Respondent have not borne fruit; that the Applicant is apprehensive that the Respondent may process her refugee relocation together with the two minors and take them out of Kenya without the consent of the Applicant; that the minors may be denied an identity card due to the lack of evidence of a Kenyan father which is required to prove citizenship by birth under Article 14 of the Constitution of Kenya, 2010; that the 1st Respondent and the Applicant had an intermittent relationship which bore the said minors herein DL and JM; that Applicant applied for birth certificate of the minors in the year 2023 which was later issued and upon which he discovered that his name had been omitted; that in the year 2024, the Applicant started pursuing efforts to have the same rectified and have his name included; that he visited the Civil Registration Department in Nairobi and that he was advised to fill an affidavit and appear together with (LN) 1st Respondent herein; that the 1st Respondent promised to sign the affidavit but ended up refusing to sign and accompanying the Applicant to the Civil Registration Department to lodge the same rectification and which has caused the Applicant emotional anguish; that the Applicant provided maintenance and paid school fees while the minors lived with their mother; that further the Applicant took full custody of the minors and enrolled them in school within Siaya and often take them to visit their mother (1st Respondent herein) and that there is evidence of payment of school fees receipts and travel tickets; that the said two children are in custody of the Applicant who is their father and that he has found it difficult to purchase a medical insurance cover for his sons since he is not able to prove that he is the father without his name being included in the birth certificates; that he has learnt that LN – 1st Respondent herein is waiting for refugee relocation and that the Applicant is apprehensive that his wife(L) may process the said relocation together with the two minors and take them out of Kenya without his knowledge; that no prejudice shall be occasioned to any party if the orders are granted; that this court has jurisdiction to make the orders he seeks.
3. The 1st and 3rd Respondents herein did not file any response to the application.
4. The 2nd Respondent filed a replying affidavit dated 18th December, 2024 sworn by Lucia Mulandi a Civil Registration Officer at the office of the 2nd Respondent who averred inter alia; that her office(Civil Registration Department) is responsible for implementing the Births and Deaths Registration Act CAP 149 Laws of Kenya(herein "CAP 149"), whose objective is to provide for the notification and registration of births and deaths and other matters incidental thereto; that the mode of registering a birth in Kenya is provided for under Section 10 of CAP 149 wherein the law states that: "every person notifying the birth of a child shall to the best of his knowledge and ability, give the prescribed particulars which shall be entered forthwith to the registrar in the register, and the person notifying the birth shall certify to the correctness of the entry by signing or if he is illiterate by fixing his mark to the register." She further averred that Section 2 of the Act defines "prescribed particulars to mean:
 - a. As to any birth, name, sex, date and place of birth, and the names, residence, occupations and nationality of the parents;
 - b. As to any death, the name, age, sex, residence, occupation and nationality of the deceased, and the date, place and cause of death;
 - c. Such other particulars as may be prescribed.

The deponent further averred that in registering, the 2nd Respondent first and foremost relies on information given by the mother and or father of the child, and only accepts information given by



other persons in the absence of the father and or mother; that Section 10 of the Act places a mandatory obligation and responsibility upon any person notifying a birth to make genuine declarations on the prescribed particulars and not on the registrar registering the birth; that it is therefore clear that in discharging its statutory duty the 2nd Respondent relies on the utmost good faith from persons notifying a birth and therefore it follows that in all instances the information given by an informant for purposes of registration of a birth is taken to be genuine and correct; that in regard to registration of DL vide birth entry No 02XXXXX and issued with certificate of birth serial No 89XXXXX issued at Nairobi on 17/5/2023 produced in support of the application, the 2nd Respondent states that the true particulars as reflected in their records in document 'LM1' are:

Name of the child – DL

Date of Birth – 21st May 2020

Date of Registration – 4th June 2020

Place of birth – Mama Lucy Kibaki Hosp. Embakasi

Birth Entry No – 02XXXXX

Name of the Father – Nil

Name of Mother – LI

Informant – Parent

It is further averred that the birth was registered within the mandatory registration of birth period of six months as per Section 8 of the Birth and Death Registration Act Cap 149; that in regard to the registration of birth of JM registered vide birth entry No 06XXXXX and issued with certificate of birth serial No 04XXXXX issued at Nairobi on 19th January 2024 produced in support of the application that the true particulars as reflected in their records on document 'LM2' are as follows:

Name of the child – JM

Date of Birth – 4th February 2022

Date of registration – 8th March 2022

Place of Birth – Isaiah Douglas Medical Centre, Kabete

Birth Entry No – 06XXXXX

Name of the Father – Nil

Name of the Mother – LI

Informant – Parent

Further, it was averred that the person who gave the information for purposes of registration from documents marked (LM1) and (LM2) is the mother Lilian Ishimwe; that the mother Lilian who is the informant from their documents marked LM1 and LM2 indicated her marital status as single; that the mother Lilian Ishimwe attested to the correctness of the information she had given in accordance to Section 10 of the Act; that Section 28 of the Act provides for correction of errors and not on alteration of facts which have been attested to as correct by the informants; that from the 2nd Respondent's point



of view, the information that was provided was correct at the time of registration of the birth; that Section 12 of the Act provides for the process of entry of a father in a register. It states that

“no person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require...”

5. The application was canvassed by way of written submissions. However, it is only the Applicant who filed submissions. The Applicant raised two issues for determination namely; whether the court has jurisdiction and whether the orders sought are proper.

On whether the court has jurisdiction, it was submitted that these proceedings have nothing to do with child maintenance or child support and that this is not a Children’s Court matter as defined under *Children’s Act*, 2022 as contended by the 2nd Respondent as the Applicant has in no way sought rights relating to maintenance or support in this application and that he has sole and undisputed custody of the minors while the 1st Respondent stays with the minors on holidays and that the Applicant provides fully for his sons. Further, it was submitted that the High Court as established in Article 165 of the *Constitution* shall subject to clause (5) have

- a. Unlimited original jurisdiction in criminal and civil matters;
- b. Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

Counsel submitted that this matter having been brought under Article 28 and 53(2) of the *Constitution* of Kenya, 2010 falls squarely within the jurisdiction of this court as delineated by Article 165.

6. On the second issue of whether the orders sought are proper, it was submitted that the propriety of the application is challenged based on exhaustion of procedure. However, a perusal of the Applicant’s affidavit will show the Applicant has time and again attempted to use proper procedure in seeking the rectification of the minors’ certificates of birth as provided under Section 28 of the *Births and Deaths Registration Act* which stipulates;

“

- “28. Correction of errors in registers (1) the Principal Registrar may, subject to the rules, and on payment of the prescribed fee (which he may in his discretion in any particular case remit), correct original entry, and shall be authenticated by the signature of the Principal Registrar.”

Counsel expressed his client’s frustrations as unfortunate in that the 1st Respondent meets the Applicant with a legal wall that is unmovable due to the lack of cooperation.

Further, it was submitted that the doctrine of exhaustion is no barrier to seeking justice. A reliance was placed on *Fleur Investments Limited v Commissioner of Domestic Taxes and another* [2018] eKLR where it was held that: whereas the courts of law are enjoined to defer to specialized tribunals and other alternative dispute resolution statutory bodies created by Parliament to resolve certain specific disputes, a court cannot, being a bastion of justice, sit back and watch such institutions ride roughshod on the rights of the citizens who seek refuge under the *Constitution* and other legislations for protection.”

It was submitted that Article 35 of the *Constitution* guarantees every person the right to the correction or deletion of untrue or misleading information that affects that person. To buttress the Applicant’s case, counsel emphasized the rights of the said minors in that Article



53 of the Constitution provides for Rights of Children and further, a child's best interests are of paramount importance in every matter concerning the child.

Finally, counsel placed reliance on the UN Convention on the Rights of the Child (CRC) which protects the economic, social, cultural, civil and political rights of children. For instance, among the twelve rights of children, children have the right to be registered when they are born. Hence, the National Government must recognize a child's name and national identity and that children must be informed of their own identity and further, official records should include their name, place and date of Birth and family relations. It was submitted that the Convention further guarantees that Children whenever possible, should know their parents and be looked after by them. Finally, it was submitted that Article 53 1(a) of the Constitution 2010 gives every child the right to a name. in the case of L.N.W v Attorney General & 3 others [2016] eKLR the court declared that:

“all children born out of wedlock shall have the right and or liberty to have the name of their fathers entered in the birth registers.

7. I have considered the application together with the submissions filed. It is not in dispute that the 1st Respondent has not filed a response to the Applicant's application. It is also not in dispute that the Applicant herein has been supporting the two minors in the past. It is also not in dispute that the certificates of births do not contain the name of the minors' biological father. It is also not in dispute that during the acquisition of the certificates of birth, it was the 1st Respondent who provided the requisite particulars to the Civil Registration Officer. It is not in dispute that the Applicant has neither provided DNA evidence showing that he is the biological father of the minors nor has he sought for an order that DNA samples be taken so as to establish the issue of paternity following the reluctance or refusal by the 1st Respondent to cooperate by accompanying him to the Civil Registration offices for the purpose of rectification of the records. That being the position, I find the issue for determination is whether the application has merit.
8. It is evident that the registration of the details in the birth registration documents were furnished by the 1st Respondent who is the biological mother of the minors. Based on the response by the 2nd Respondent, it is clear that the 2nd Respondent believed and trusted the information given by the 1st Respondent and that the office went ahead to issue the certificates of birth to the 1st Respondent. The chronology of the processes in the issuance of a certificate of birth have been provided by the 2nd Respondent vide the replying affidavit dated 18th December, 2024 which was as follows:
 - i. Civil Registration Department is responsible for implementing the Births and Deaths Registration Act CAP 149 Laws of Kenya (herein “CAP 149”), whose objective is to provide for the notification and registration of births and deaths and other matters incidental thereto.²)
 - ii. that the mode of registering a birth in Kenya is provided for under Section 10 of the Act wherein the law states that: “every person notifying the birth of a child shall to the best of his knowledge and ability, give the prescribed particulars which shall be entered forthwith the registrar in the register, and the person notifying the birth shall certify to the correctness of the entry by signing or if he is illiterate by fixing his mark to the register.”
 - iii. Section 2 of the Act 149 defines “prescribed particulars to mean:
 - d. As to any birth, name, sex, date and place of birth, and the names, residence, occupations and nationality of the parents;



- e. As to any death, the name, age, sex, residence, occupation and nationality of the deceased, and the date, place and cause of death;
 - f. Such other particulars as may be prescribed.
- iv. that in registering, the 2nd Respondent first and foremost relies on information given by the mother and or father of the child, and only accepts information given by other persons in the absence of the father and or mother and that Section 10 of the Act places a mandatory obligation and responsibility upon any person notifying a birth to make genuine declarations on the prescribed particulars and not on the registrar registering the birth and hence in discharging its statutory duty the 2nd Respondent relies on the utmost good faith from persons notifying a birth and that in all instances, the information given by an informant for purposes of registration of a birth is taken to be genuine and correct.v)
- v. that in regard to registration of DL vide birth entry No 02XXXX and issued with certificate of birth serial No 8XXXX issued at Nairobi on 17/5/2023 produced in support of the application, the 2nd Respondent states that the true particulars as reflected in their records in document 'LM1' are:
- Name of the child – DL
- Date of Birth – 21st May 2020
- Date of Registration – 4th June 2020
- Place of birth – Mama Lucy Kibaki Hosp. Embakasi
- Birth Entry No – 02XXXX
- Name of the Father – Nil
- Name of Mother – LI
- Informant – Parent
- That the birth was registered within the mandatory registration of birth period of six months as per Section 8 of the Birth and Death Registration Act Cap 149.
- vi. that in regard to the registration of birth of JM registered vide birth entry No 06XXXX and issued with certificate of birth serial No 04XXXX issued at Nairobi on 19th January 2024 produced in support of the application that the true particulars as reflected in their records on document 'LM2' are as follows:
- Name of the child – JM
- Date of Birth – 4th February 2022
- Date of registration – 8th March 2022
- Place of Birth – Isaiah Douglas Medical Centre, Kabete
- Birth Entry No – 06XXXXX
- Name of the Father – Nil
- Name of the Mother – LI
- Informant – Parent



Further, it is stated that the person who gave the information for purposes of registration from documents marked (LM1) and (LM2) is the mother Lilian Ishimwe whose documents marked LM1 and LM2 indicated her marital status as single and who attested to the correctness of the information she had given in accordance to Section 10 of the Act.

- Vii) that Section 28 of the Act provides for correction of errors and not on alteration of facts which have been attested to as correct by the informants and that from the 2nd Respondent's point of view, the information that was provided was correct at the time of registration of the birth.
- Viii) that Section 12 of the Act provides for the process of entry of a father in a register. It states that
- “no person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require...”
9. Going by the procedures as deponed by the 2nd Respondent, it is clear that the 2nd Respondent was not at fault to issue the certificates of birth as they are to the 1st Respondent based on the information that she gave. The Applicant has contended that his attempts to approach the 2nd Respondent for the purpose of correcting the errors in the register has been futile based on the 2nd Respondent's assertion that the Applicant should exhaust all the processes. Indeed, under Article 53 of the Constitution, the minors herein have rights which must be enjoyed that include the right to be registered when they are born, to be informed of their identity, the right to know their parents. Further, every child has the right to a name since the conventional rule is that all children born of both parents or out of wedlock have the right to have the names of their parents entered in the Certificate of Birth Register.
10. Whereas the Applicant is entitled to be registered as the father of the minors, he has not surmounted the burden of showing that indeed he is the biological father of the minors. The Applicant has claimed that he has been frustrated by the 1st Respondent who has not cooperated in joining him at the Registrar's office for the correction of the error in the certificates. The refusal by the 1st Respondent to cooperate tells a lot. It is either that the Applicant is not the biological father of the minors or that she has some unfinished issues with the Applicant regarding their marital status. This is the uphill task he must accomplish in view of the fact that the 1st Respondent has not even filed a response to his application. Had the 1st Respondent filed a response and confirmed that the Applicant is indeed the biological father of the minors, then this court could then consider the question whether to compel the 2nd Respondent to enter his names on the certificates of birth for the minors. In the absence of any confirmation by the 1st Respondent that the Applicant is the biological father of the minors, then the Applicant ought to have presented DNA evidence showing that he is the biological father of the minors and if not then he ought to have sought for an order that DNA tests be conducted in order to determine the paternity of the two minors. I find that the Applicant has not managed to convince this court to grant the orders sought. The doctrine of exhaustion must kick in and that the Applicant is directed exhaust the requisite procedures regarding the issue of rectification and or correction of errors in the certificate of birth registers managed by the 2nd Respondent. Even the prayer sought in No 2 of the application would not suffice in view of the fact that the issue of paternity of the minors is still yet to be determined. The Applicant will not suffer prejudice in that once the issue of paternity is resolved, appropriate orders could be made for compliance even if the minors will have left the country as there are various reciprocal treaties between Kenya and several countries and that orders issued by the courts will be enforced appropriately.
11. In the result, it is my finding that the Applicant's application dated 16th December, 2024 lacks merit. The same is dismissed with no orders as to costs.



DATED AND DELIVERED AT SIAYA THIS 14TH DAY OF MARCH 2025

D. KEMEI

JUDGE

In the presence of:

Paschal Nyamogo.....Applicant

Muriuki.....for Applicant

N/A.....st Respondent

N/A Esendi.....for 2nd and 3rd Respondent

Ogendo.....Court Assistant

